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Via ECF and Email
Honorable John P. Cronan
United States District Court for the Southern District of New York
500 Pearl Street
New York, NY 10007

Re: Doe v. Anthem HealthChoice Assurance, Inc., 24 Civ. 8012 (JPC)

Dear Judge Cronan:

We represent plaintiffs Jane Doe, on behalf of Baby Doe, and Patricia Cavallaro-Kearins and write in response to Anthem HealthChoice Assurance, Inc.'s request for a pre-motion conference. Plaintiffs are federal employees (or the beneficiary of a federal employee) who enrolled in Anthem's BlueCross BlueShield insurance plan. Compl. ¶¶ 70, 85. Plaintiffs allege that Anthem has failed to maintain current and accurate records of in-network mental health providers—in violation of its contractual and statutory duty to do so—and falsely represented that it maintained such records. *Id.* ¶¶ 36–48, 117–64. Anthem's failure to maintain such records has stymied plaintiffs' ability to obtain medically necessary healthcare, leaving Ms. Cavallaro-Kearins and Baby Doe unable to obtain timely and affordable care for their ADHD and autism diagnoses respectively. *Id.* ¶¶ 71–84, 86–96. Plaintiffs pursue claims for breach of contract, deceptive business practices, false advertising, violation of N.Y. Ins. L. § 4226, fraudulent misrepresentation, and unjust enrichment, and seek both damages and equitable relief on behalf of a putative class. *Id.* ¶¶ 216–84. Plaintiffs defer to the Court on whether a conference would be appropriate. We write to summarize why Anthem's bevy of arguments for dismissal should be rejected.[1]

I. Plaintiffs Were Not Required To Sue OPM Rather Than Anthem

First, plaintiffs were not required to sue the federal Office of Personnel Management ("OPM") rather than Anthem. Dkt. No. 17 at 2. Plaintiffs are not disputing Anthem's decision to deny coverage on any particular benefit claim, but rather are challenging Anthem's systemic failure to maintain an accurate directory of in-network mental health providers. The law is clear that plaintiffs may pursue such a claim against Anthem directly and without awaiting OPM's review.

In particular, the relevant regulation "instructs enrollees who seek to challenge *benefit denials* to proceed in court against OPM 'and not against the carrier or carrier's subcontractors,'" but does not require naming OPM as the defendant under any other circumstance. *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 696 (2006) (quoting 5 C.F.R. § 890.107(c) (emphasis added)). To the contrary, the regulation states that an insured must sue OPM rather than the carrier

[1] Plaintiffs do not seek to amend their complaint in response to Anthem's letter, but if the Court finds the complaint deficient in any respect, plaintiffs respectfully request leave to amend. *See Mandala v. NTT Data, Inc.*, 88 F.4th 353, 363–64 (2d Cir. 2023) (explaining that leave to amend should be granted even if plaintiffs did not propose amendments in response to pre-motion-conference letter).

only when she seeks review "of OPM's final action on the denial of a health benefits claim," and the only relief available in such circumstances is "a court order directing OPM to require the carrier to pay the amounts in dispute." 5 C.F.R. § 890.107(c). Plaintiffs here do not seek this Court's review of Anthem's denial of payment for particular medical services; rather, they allege that Anthem's failure to maintain accurate records deprived them of the opportunity to find providers who accepted their Anthem insurance. Compl. ¶¶ 74–83, 89–96; *cf. In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 1008–09 (N.D. Cal. 2016) (holding that data breach claim against Anthem did not need to be exhausted with OPM because plaintiffs' claim did not fall within definition of a denial of "health benefits").

By the same token, plaintiffs were not required to exhaust administrative remedies with the carrier or OPM, as only the denial of a health benefit claim must be exhausted. 5 C.F.R. § 890.105(a)(1); *see Kirkendall v. Halliburton, Inc.*, 707 F.3d 173, 179–80 (2d Cir. 2013) (holding exhaustion not required in ERISA context where insured sought clarification of "future benefits," as plan documents required her to exhaust only the denial of an immediate "benefit claim").

II. Plaintiffs' Claims Are Not Preempted

Second, plaintiffs' state-law claims are not preempted by the Federal Employees Health Benefits Act's ("FEHBA") express terms or by any conflict with federal law. Dkt. 17 at 2–3. FEHBA preempts state law only when "two preconditions" are present, the second of which is absent here. *Coventry Health Care of Mo. v. Nevils*, 581 U.S. 87, 94 (2017). "First, preemption only occurs when the FEHBA contract terms at issue 'relate to the nature, provision, or extent of coverage or benefits.'" *Empire HealthChoice, Assurance, Inc. v. McVeigh*, 396 F.3d 136, 145 (2d Cir. 2005) (internal citation omitted). "Second, federal law may only preempt state or local laws if those laws 'relate to health insurance or plans.'" *Id.* (internal citation omitted and alteration adopted).

Plaintiffs' claims are not preempted because, as the Second Circuit has held, state "laws of general application that make absolutely no reference to health insurance or plans" do not fall within the second preemption requirement. *Id.* at 146. That precisely describes the claims that plaintiffs pursue here: common law and statutory claims that are not specific to the regulation of health insurance. One court in this District has held that the Second Circuit's preemption analysis in *Empire HealthChoice* was "dicta" because the Supreme Court affirmed on other grounds, *see Mahajan v. Blue Cross Blue Shield Ass'n*, 2017 WL 4250514, at *8 (S.D.N.Y. Sept. 22, 2017), but plaintiffs respectfully disagree with that conclusion. To the contrary, the Second Circuit has held that its rulings "remain[] the law of this Circuit, notwithstanding the Supreme Court's decision . . . affirming this Court's judgment on other grounds," at least in the absence of any "fundamental" conflict or inconsistency with the Supreme Court's ruling. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144, 151, 154–55 (2d Cir. 2015). As plaintiffs will explain further in full briefing, no such conflict with the Supreme Court's decision is present here, and thus plaintiffs' claims are not preempted by FEHBA.

Nor are plaintiffs' claims preempted by any conflict with federal law. Dkt. 17 at 3. To the contrary, the Second Circuit in *Empire HealthChoice* held that no conflict with federal interests would arise by applying state contract law in a case involving federal employee health benefits, because the carrier "fail[s] to mention a single state law or state-imposed duty that runs contrary to the federal interests asserted in this case." 396 F.3d at 141; *see id.* (rejecting carrier's attempt "to speculate

about the various harms that 'might' result from state-by-state adjudication of suits"). So too here, plaintiffs seek only to enforce obligations consistent with Anthem's obligation to the federal government, so no conflict arises. *See Figueroa v. Foster*, 864 F.3d 222, 234–35 (2d Cir. 2017).

III. Anthem Lacks Sovereign Immunity

Nor is Anthem cloaked with federal sovereign immunity. Dkt. 17 at 3. Federal contractors have "derivative sovereign immunity" only when they can show that "the contractor's performance [was] in compliance with all federal directions." *Badilla v. Midwest Air Traffic Control Serv., Inc.*, 8 F.4th 105, 125 n.8 (2d Cir. 2021) (internal quotation marks omitted); *see also In re World Trade Ctr. Disaster Site Litig.*, 521 F.3d 169, 196–97 (2d Cir. 2008). Plaintiffs do not allege that the federal government condoned Anthem's failure to maintain accurate records of in-network providers; to the contrary, plaintiffs allege that Anthem breached its contractual and statutory obligations by failing to do so. Compl. ¶¶ 118–21. Even if it were relevant to the immunity analysis whether Anthem would be indemnified by the government, the government does not indemnify carriers like Anthem for their own misconduct. Rather, the government pays Anthem for the cost incurred for "covered health care services" or for "administrative expenses," which are defined terms that do not purport to include a judgment against the carrier for its own wrongdoing. 48 C.F.R. § 1652.216-71(b)(2). Thus, the cases cited by Anthem—which involved claims against carriers for failure to pay for particular health procedures—are inapposite.

IV. Plaintiffs May Pursue Their Breach-Of-Contract Claim

Finally, plaintiffs may pursue their claim for breach of contract as intended beneficiaries of OPM's contract with Anthem. Dkt. 17 at 3. The case cited by Anthem held otherwise because it observed that contracts intended to benefit the general public typically cannot be enforced "absent clear intent indicating the public's right to enforce the contract as a third party beneficiary." *Fero v. Excellus Health Plan, Inc.*, 236 F. Supp. 3d 735, 768 (W.D.N.Y. 2017) (internal quotation marks and emphasis omitted). But that principle is inapplicable here because plaintiffs do not seek to enforce a contract benefiting the *public*; rather, they seek to enforce a contract benefiting a narrower class of federal employees who chose to enroll in Anthem's health insurance plan. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999) ("The intended beneficiary need not be specifically or individually identified in the contract, but must fall within a class clearly intended by the parties to benefit from the contract."); *Eldridge v. Shelby Cnty.*, 2020 WL 1962988, at *11–12 (W.D. Tenn. Apr. 23, 2020) (holding government employee an intended beneficiary of government employee insurance policy); *Rivera v. Bank of Am. Home Loans*, 2011 WL 1533474, at *4–5 (E.D.N.Y. Apr. 21, 2011) (holding federal contract with bank was intended to benefit homeowner). Plaintiffs acknowledge, however, that they may not pursue "benefit-of-the-bargain" damages for the reason stated by Anthem, but because that is "not the only damage theor[y] proffered by Plaintiffs," it is not a basis for dismissing the contract claim as a whole. *Fero*, 236 F. Supp. 3d at 781 n.7; *see* Compl. ¶ 233.

V. Briefing Schedule

In its proposed briefing schedule, Anthem requests approximately six weeks to file its opening brief, four weeks for plaintiffs to file their opposition, and four weeks for Anthem to reply. Dkt. 17 at 3. Plaintiffs do not object to Anthem's request for a lengthy briefing schedule but ask only that the Court provide the parties an equal amount of time in which to file their opening briefs.

Respectfully submitted.

/s/ Jacob Gardener

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